SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 53

UNITED STATES OF AMERICA,

Petitioner,

vs.

PAUL DAVIS SHERIDAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Opinion Below

The opinion of the Circuit Court of Appeals (R. 21-25) is reported at 152 F. 2d 57.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered November 19, 1945 (R. 21), and a petition for rehearing was denied January 28, 1946 (R. 26-29). The petition for a writ of certiorari was filed March 5, 1946, and granted May 13, 1946. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

Questions Presented

The question presented by the Government's petition for a writ of certiorari is: Whether a person who fraudulently cashes in one state a falsely made or forged check drawn on a bank in another state, which check is thereafter transmitted to the drawee bank for payment, has, with "fraudulent intent", "caused" a falsely made or forged security to be transported in interstate commerce within the meaning of Section 3 of the National Stolen Property Act.

If that question is answered affirmatively, two further questions, not passed on by the court below and obviously not raised by the Government's petition for certiorari, are involved:

(1) Whether reversible error was committed by the admission of certain hearsay testimony on behalf of the Government.

(2) Whether the evidence adduced by the Government is sufficient to sustain the conviction.

Statute Involved

The National Stolen Property Act of May 22, 1934, c. 333, 48 Stat. 794, 795, as amended by the Act of August 3, 1939, c. 413, 53 Stat. 1178 (18 U. S. C. 413-419), provides in pertinent part as follows:

> Sec. 2. That when used in this Act—
>
> (a) The term "interstate or foreign commerce" shall mean transportation from one State, Territory, or the District of Columbia to another State, Territory, or

the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.

(b) The term "securities" shall include any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise; or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise, or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing.

* * * * * * *

Sec. 3. Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, *feloniously converted*, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, *feloniously converted*, or taken, *or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, or whoever with unlawful or fraudulent intent shall transport, or cause to be transported in interstate or foreign commerce, any bed piece, bed plate, roll, plate, die, seal, stone, type, or other tool, implement, or thing used or fitted to be used in falsely*

making, forging, altering, or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: *Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States" as defined in section 147 of the Criminal Code (U. S. C., title 18, sec. 261) or (2) an obligation, bond, certificate, security, Treasury note, bill, promise to pay, or bank note, issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288), or by a bank or corporation of any foreign country.*[1]

Statement

Respondent was charged with violating Section 3 of the National Stolen Property Act (18 U. S. C. 415, *supra*) by an indictment in three counts filed October 27, 1944, in the United States District Court for the Eastern District of Michigan (R. 1, 2-4). Each count of the indictment alleged that respondent did, "with fraudulent intent, transport and/or cause to be transported in interstate commerce * * * a certain falsely made, forged, altered, or counterfeited security * * * knowing the same to have been falsely made, altered, forged, or counterfeited * * *." Count One covered a check for $62.50 drawn on the First National Bank of Cape Girardeau, Missouri, payable to "P. H. D. Sheridan" and purporting to be signed as maker by "U. S. E. F. C. 14A, A. J. Davis, Commissioner"; Count Two covered an identically drawn check for the same amount; and Count Three covered a check for $50.00 drawn on the First National Bank of Boston, Massachusetts, payable to "Cash" and signed as maker by "P. H. D. Sheridan" (R. 2-4).

[1] The portions in italics were added by the amendment of August 3, 1939, *supra*.

Respondent waived the right to the assistance of counsel (R. 1, 5, 6, 7), was tried before a jury which found him guilty on each count of the indictment (R. 6), and was sentenced to imprisonment for five years on each count, the sentences to run concurrently (R. 7-8).[2]

The trial proceedings were not stenographically reported (R. 20), and respondent and counsel for the Government entered into a stipulation with respect to a statement of evidence in which it was agreed that such statement was prepared from memory and notes made during the trial and substantially sets forth the testimony and evidence presented; the statement was made part of the record upon the approval of the Trial Court and now appears at R. 17-20 (see R. 20).[3]

The Government's evidence, as disclosed by the statement of evidence, may be summarized as follows:

1. Respondent, on July 19, 1943, when he checked out of the Otsego Hotel in Jackson, Michigan, where he had registered the preceding day, presented a check for $50.00 drawn on the "First National Bank of Boston, Massachusetts", payable to "Cash" and bearing the endorsement "P. H. D. Sheridan, 230 Park Avenue, New York". The hotel clerk, who did not see respondent endorse the check, cashed it, deducting the bill of $3.50 and giving respondent $46.50 in cash. The check was returned unpaid, and, when the clerk next saw it, it bore the same endorsements as appeared on it when offered in evidence. (R. 17-18; count 3.)

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[2] The Government does not here seek to sustain the conviction on Count 3 (Petition, p. 6; Brief, p. 18) for the reason that "it is not clear [that] a check signed by the respondent in his own name as maker * * * is falsely made or forged within the general law." (Brief, p. 18.) This is discussed at p. 28, *infra*.

[3] That procedure was, of course, proper. *Miller* v. *United States*, 317 U. S. 192, 198-199; petition for rehearing denied, 317 U. S. 713.

2. About noon of the same day, July 19, 1943, respondent bought some luggage in a store in Jackson, presenting in payment a check for $62.50 drawn on the "First National Bank of Cape Girardeau, Missouri", payable to "P. H. D. Sheridan" and signed as maker by "U. S. E. F. C. 14A, A. J. Davis, Commissioner", which it was stated had been received in the course of respondent's business. The store manager did not see respondent endorse the check, but he accepted it in payment of the luggage valued at $36.00, giving respondent $26.50 in change, and deposited it in the Jackson Bank and Trust Company. The check was later returned unpaid. (R. 18, count 1.)

3. Also about noon of July 19, 1943, respondent cashed a check for $62.50 (drawn identically with the check described in the preceding paragraph) at the National Bank of Jackson. The assistant cashier who had approved payment testified that the records of the bank showed that the check was forwarded to the drawee bank for payment. It was later returned marked unpaid. (R. 18-19; count 2.)

4. That assistant cashier, after being qualified as an expert in banking matters, testified, over respondent's objection, that from the endorsements on the three checks all were presented for payment in Jackson, the Boston check had been forwarded to Boston and the other two checks had been forwarded to Missouri, and all had been returned unpaid to the forwarding bank marked no account (R. 19).

5. A Jackson police officer testified, over respondent's objection, that he had learned through police channels that respondent had been arrested in Eau Claire, Wisconsin, on July 20, 1943 (R. 19).

6. An agent of the Federal Bureau of Investigation testified "that his office had conducted an investigation in Washington, D. C., and that the United States Department of

Commerce has no agency 'U. S. E. F. C. 14A,' or one 'A. J. Davis, Commissioner'." (R. 19.) Respondent objected that such testimony constituted hearsay (R. 19), and on cross-examination the witness admitted that he had not personally conducted the investigation and based his statements on reports prepared by his Department (R. 20).

At the end of the presentation of the Government's evidence, respondent's motion to dismiss was denied, and his motion to keep from the jury various aliases set forth in the indictment was granted (R. 20). The Government then closed, and respondent closed without offering any evidence (R. 20).

A motion for a new trial (R. 8-13) was denied (R. 14), and respondent filed a notice of appeal, specifying, among other things, that: (1) the Trial Court erred in matters of law and in admitting certain testimony and documents into evidence over respondent's objection; (2) the verdict was contrary to the evidence and not supported by sufficient evidence; and (3) the trial court erred in giving and refusing to give certain instructions[4] (R. 14-15).

The Circuit Court of Appeals reversed, holding, on authority of the decision of this Court in *Kann* v. *United States*, 323 U. S. 88 (which reversed a conviction under the mail fraud statute, section 215 of the Criminal Code, 18 U. S. C. 338), that the activities of respondent as disclosed by the proof adduced by the Government did not contravene section 3 of the National Stolen Property Act (R. 21-25); no other point was discussed or passed upon (R. 23).

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[4] The instructions given and the rulings on instructions requested do not appear in the record. If the cause should be remanded to the Circuit Court of Appeals for further proceedings, it is suggested that it would be appropriate to suggest to that Court in the remand that it exercise its powers to secure a complete bill of exceptions, including the instructions given and all pertinent rulings in connection therewith. See *Miller* v. *United States*, 317 U. S. 192, 199-200; petition for rehearing denied, 317 U. S. 713.

Summary of Argument

Part I

Assuming, without conceding, the sufficiency of the Government's evidence, no violation of the statute is shown because respondent, within the meaning of the statute, did not "cause" the interstate transportation of the checks, or, in the alternative, did not "with fraudulent intent" "cause" them to be so transported.

A. Since there is no claim that respondent himself transported the checks, the conviction cannot be sustained unless he "caused" the interstate transportation which it is assumed occurred when the checks, after respondent had cashed them, were forwarded to the out-of-state banks on which they were drawn. Respondent did not direct, suggest, or encourage that interstate transportation; there is nothing to indicate that he had any conscious knowledge, intent, plan, or desire that the checks would be so transported; and that interstate transportation was not an essential or integral part of the asserted fraud because respondent had obtained his objective when he successfully cashed the checks. The only basis for holding that respondent "caused" the interstate transportation of the checks is the circumstance that such transportation would not have resulted if he had not cashed them. The word "cause" as used in the statute should not be so broadly construed. Such a broad construction finds little actual support in judicial precedent, extends the statute beyond its purpose and produces absurd and unjust results. The purpose of the statute as disclosed by its background and legislative history is the punishment of those who used or brought the use of interstate transportation as an integral part of carrying out their illegal activities. There is nothing to indicate that Congress intended to reach illegal activities, such

as those in which respondent is claimed to have engaged, which are essentially local in character and incidentally result in interstate transportation which is neither essential nor substantially related to the carrying out of these activities.

B. If it is nevertheless believed that respondent "caused" the interstate transportation of the checks, he did not "cause" that transportation "with fraudulent intent" as required by the statute. The provisions of the 1939 amendment to the statute which cover spurious securities are *pari materia* with the mail-fraud statute (Criminal Code Section 215, 18 U. S. C. 338) and, on the basis of the construction of the mail fraud statute in *Kann* v. *United States*, 323 U. S. 88, and *Dyhre* v. *Hudspeth*, 106 F. 2d 286 (C. C. A. 10), the asserted activities of respondent do not contravene the instant statute. The difference in language used in the two statutes is immaterial when the similarity of plan and purpose of the two statutes is considered. Both depend upon the element of fraud for their operation and there is no persuasive or logical reason for supposing that Congress meant to be more solicitous in protecting the channels of interstate transportation against becoming avenues of fraud than it has been of the mails. The only sound construction of the requirement of fraudulent intent in the 1939 amendment to section 3 of the National Stolen Property Act is that it means that the interstate transportation of spurious securities must be for the purpose of executing a fraudulent scheme. The effect of any other construction is to read the requirement of fraudulent intent out of the statute. Consistently with the legislative purpose of the statute, the spurious securities provisions of the 1939 amendment cover the interstate transportation of spurious securities as an integral part of executing a fraudulent scheme, leaving other situations to be dealt with by appropriate

state law. Respondent's asserted fraudulent scheme was completed when he cashed the checks and their subsequent interstate transportation was not in furtherance of that scheme. Accordingly, respondent did not "with fraudulent intent" "cause" the interstate transportation of the checks within the meaning of the statute.

Part II

If the question of the construction of the statute is resolved unfavorably to respondent, this Court should grant a new trial because reversible error was committed by the admission of certain hearsay testimony and because the evidence of the Government is insufficient to sustain the conviction. Neither of those grounds was passed upon below or presented by the petition for a writ of certiorari, but we believe that under the circumstances of this case this Court should exercise its undoubted power to consider them.

A. The testimony of an agent of the Federal Bureau of Investigation with respect to an investigation conducted by his office which was based on reports prepared by his department was clearly hearsay and its admission constituted reversible error. The same is true of the testimony of a Jackson police officer that he had learned through police channels of the arrest of respondent. The admission of the hearsay testimony of those two officers cannot be characterized as "mere harmless error".

B. The evidence of the Government is insufficient to sustain the conviction on Counts One and Two of the indictment, and since the Government does not seek to sustain the conviction on Count Three, there should be a new trial. The Government presented no direct evidence of the existence of the essential elements of fraudulent intent and knowledge of the spurious character of the securities. The

circumstantial evidence on those elements discloses only that respondent negotiated two identically drawn checks, both of which were dishonored by the drawee bank because the purported maker had no account, and that an investigation disclosed that the United States Department of Commerce had no agency or agent bearing the name of the purported maker. That is not sufficient to support an inference that respondent passed those two checks with knowledge that they were spurious and with fraudulent intent. The fact that a person passed a forged check or counterfeit money does not prove or justify an inference that he knew its spurious character or that he intended to defraud. Something more than the naked act of passing must be shown, and that is lacking here.

ARGUMENT

PART I

The Alleged Activities of Respondent Did Not Contravene the Statute

Introduction

Respondent's conviction was for violating the portion of the 1939 amendment to section 3 of the National Stolen Property Act which deals with spurious securities and in pertinent part provides punishment for "whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited" (*ante*, pp. 3-4).[5] Whatever may be the proper interpretation of that language, it is obvious that the offense

[5] The term "securities" as defined in section 2 of the statute includes checks (see *ante*, pp. 2-3).

The 1939 amendment further provides that it shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of

thereby created consists of four elements—there must be (1) unlawful or fraudulent intent, (2) transportation in interstate or foreign commerce, (3) a falsely made, forged, altered, or counterfeited security, and (4) knowledge of the spurious character of the security. Assuming for the purposes of this Part I, what is not conceded as is evident from Part II of this argument, that the evidence of the Government was sufficient to show the presence of those four elements, namely, that respondent had a fraudulent intent at some time in connection with the matter,[6] that the checks were forwarded in interstate commerce by banks in Jackson after respondent had cashed them, that at least one of them was falsely made or forged and that respondent knew that,[7]

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an "obligation or other security of the United States" as defined in 18 U. S. C. 261, or of certain foreign securities (*ante*, pp. 3-4). The words "obligation or other security of the United States", as defined in 18 U. S. C. 261, include checks "drawn by or upon authorized officers of the United States". If the two checks which were signed as maker by "U. S. E. F. C. 14A, A. J. Davis, Commissioner" (counts 1 and 2) fall within that definition, the conviction should not stand because the Government does not here urge error with respect to the reversal of the conviction on the third count, covering the check signed by "P. H. D. Sheridan" as maker (Brief, p. 18). Since those two checks were drawn on a private bank, they would not fall within that definition unless A. J. Davis was an authorized officer of the United States. The Government has attempted to show that no such officer exists (R. 19-20).

[6] It is true that the statutory language is "unlawful or fraudulent intent", but the question presented by the Government (Brief, p. 2) and argued throughout refers only to fraudulent intent. From that we assume that the Government does not contend that respondent had any unlawful intent as distinguished from his asserted fraudulent intent. Indeed, there does not seem to be any basis for such a contention. This argument therefore considers only the question of fraudulent intent.

[7] Since the sentences were concurrent, the conviction may be sustained on any count of the indictment. The Government does not contend that any of the checks were "altered" or "counterfeited"; does not urge error with respect to the reversal on the third count of the indictment because of uncertainty as to whether the check there involved was "falsely made" or "forged"; and limits its argument to a contention that the checks covered by counts one and two were "falsely made" or "forged" (Brief, p. 18). For a discussion of whether the check covered by the third count was "falsely made" or "forged" see *infra* p. 28.

it is nevertheless submitted that no violation of the statute is shown because respondent, within the meaning of the statute, did not "cause" the interstate transportation of the checks, or, in the alternative, did not "with fraudulent intent" "cause" them to be so transported.

A. *Respondent did not "cause" the interstate transportation of the checks.*

Since there is no claim that respondent himself transported the checks, his conviction cannot be sustained unless he can be said to have "caused" the interstate transportation which it is assumed occurred when the checks, after respondent had cashed them, were forwarded by the Jackson banks to the out-of-state banks on which they were drawn. This Court has not passed on whether interstate transportation is "caused" under such circumstances, and, in considering whether the use of the mails was "caused" under similar circumstances, without deciding the matter, indicated that there was some doubt whether "the defendants may be said to have 'caused' the mailing of the checks". *Kann* v. *United States*, 323 U. S. 88, 93.

Respondent did not direct, suggest, or encourage the interstate transportation of the checks. There is nothing to indicate that he had any conscious knowledge, intent, plan or desire that they be so transported; indeed, their transportation was the sure means of revealing his asserted fraud. Moreover, the interstate transportation was not an essential or integral part of the fraud because respondent had obtained his objective when he successfully cashed the checks. The only basis for holding that respondent "caused" the interstate transportation of the checks is the circumstance that such transportation would not have resulted if he had not cashed them. The word "cause" as used in the statute should not be so broadly construed.

True, that word, which is used in numerous sections of Title 18 of the United States Code defining offenses against the postal service and against foreign and interstate commerce,[8] has been characterized as a word of "very broad import" with the well known sense of "bringing about". *United States* v. *Kenofskey*, 243 U. S. 440, 443. And, it has been held that a person may "cause" interstate transportation even though no specific direction is given to that effect. See *Backun* v. *United States*, 112 F. 2d 635 (C. C. A. 4); *United States* v. *Turley*, 135 F. 2d 867 (C. C. A. 2), certiorari denied, 320 U. S. 745; *Millette* v. *United States*, 4 F. 2d 635 (C. C. A. 7).[9] It does not follow, however, that a person has "caused" interstate transportation merely because it may be the natural and probable consequence

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[8] For example:
18 U. S. C. 334—Mailing obscene matter
18 U. S. C. 335—Mailing libelous and indecent matter on wrappers or envelopes
18 U. S. C. 336—Lottery circulars not mailable
18 U. S. C. 338—Using mails to promote frauds
18 U. S. C. 338a—Mailing threatening communications
18 U. S. C. 340—Poisons or explosives not mailable
18 U. S. C. 341—Use of mails for advertisements of intoxicating liquors in prohibition states
18 U. S. C. 351—Inclosing higher in lower class matter
18 U. S. C. 358—Fraudulently increasing weight of mail
18 U. S. C. 387—Importing lottery tickets.
18 U. S. C. 388—Intoxicating liquors; by interstate shipment
18 U. S. C. 390—Intoxicating liquors; shipping packages in interstate commerce not plainly marked
18 U. S. C. 396—Importing and transporting obscene books
18 U. S. C. 398—White-slave traffic
18 U. S. C. 400—White-slave traffic
18 U. S. C. 407a—Transporting strikebreakers
18 U. S. C. 408—Motor vehicles
18 U. S. C. 408a—Kidnapped persons
18 U. S. C. 415—National Stolen Property Act
18 U. S. C. 419b—National Cattle Theft Act

[9] There are similar holdings with respect to "causing" the use of the mails. See *United States* v. *Kenofskey*, 243 U. S. 440; *Demolli* v. *United States*, 144 Fed. 363 (C. C. A. 8); *Freeman* v. *United States*, 244 Fed.

or the reasonably foreseeable result of action intentionally taken. The above cited cases involved more than the mere passive occurrence of a natural and probable consequence, and in all of them the interstate transportation was essential to, or substantially helped in, carrying out the criminal activity involved and was an integral part of that activity. Thus, there was evidence of a conscious knowledge and desire that interstate transportation would be used in the *Backun* case, 112 F. 2d at 636 and 638; the maintenance of a market for disposing of stolen securities by the defendants in the *Turley* case induced and encouraged interstate transportation which materially aided them in their illegal activities; and, in the *Millette* case there was evidence that it was "Millette's purpose and plan and contrivance to have these cars transported to a place beyond the Minnesota boundaries", 4 F. 2d at 636.[10] Moreover, the activities of the defendants in the *Backun* and *Turley* cases were such that they might be considered as having aided and abetted

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1 (C. C. A. 7), certiorari denied, 245 U. S. 654; *Grant* v. *United States*, 268 Fed. 443 (C. C. A. 6), certiorari denied, 256 U. S. 700; *Butler* v. *United States*, 53 F. 2d 800 (C. C. A. 10); *Smith* v. *United States*, 61 F. 2d 681 (C. C. A. 5), certiorari denied, 288 U. S. 608; *United States* v. *Weisman*, 83 F. 2d 470 (C. C. A. 2), certiorari denied, 299 U. S. 560, rehearing denied, 299 U. S. 621; *Corbett* v. *United States*, 89 F. 2d 124 (C. C. A. 8); *Clarke* v. *United States*, 132 F. 2d 538 (C. C. A. 9), certiorari denied, 318 U. S. 789; *Blue* v. *United States*, 138 F. 2d 351 (C. C. A. 6), certiorari denied, 322 U. S. 736, 737, rehearing denied, 322 U. S. 771; *United States* v. *Cohen*, 145 F. 2d 82 (C. C. A. 2), certiorari denied, 323 U. S. 799; *Richardson* v. *United States*, 150 F. 2d 58 (C. C. A. 6).

[10] Similar threads of conscious knowledge, desire, plan, intent or direction and of the substantial relation of the use of the mails to the consummation of the improper activities being conducted run through most of the cases involving the use of the mails which are set forth in note 9, *ante*. Thus, the action in *United States* v. *Kenofskey* was "deliberately calculated" to effect the use of the mails which was essential to the consummation of the fraud, 243 U. S. 440, 443. The use of the mails was obviously necessary in order to conduct the fraudulent business activities involved in *Freeman* v. *United States*, 244 Fed. 1 (C. C. A. 7), certiorari denied, 245 U. S. 654; *Butler* v. *United States*, 53 F. 2d 800 (C. C. A. 10); *Blue* v. *United States*, 138 F. 2d 351 (C. C. A. 6), certiorari denied, 322 U. S.

the commission of the offense and hence were guilty as principals by force of section 332 of the Criminal Code (18 U. S. C. 550). This point was one basis for the decision in the *Backun* case. See also *Schrader* v. *United States*, 94 F. 2d 926 (C. C. A. 8), as explained by *La Page* v. *United States*, 146 F. 2d 536 (C. C. A. 8). That is not the case here, for there was no unlawful act independent of that which is sought to be charged to respondent.

There are several decisions by the lower federal courts, but none by this Court, that the use of the mails or the channels of interstate commerce by banks in clearing checks is "caused" by persons who previously negotiated them for improper purposes or who were engaged in improper activities in connection with which the checks were previously negotiated. While causation is discussed in terms of natural and probable consequence and reasonably foreseeable result in many of these decisions, most of them, like those just discussed, actually involve situations in which there was a conscious knowledge, plan, intent, desire or direction that the mails or the means of interstate commerce would be employed and in which that employment was either essential or closely related to the execution of the improper activities in which the defendants were engaged.[11] As

736, 737, rehearing denied 322 U. S. 771; and *United States* v. *Cohen*, 145 F. 2d 82 (C. C. A. 2), certiorari denied, 323 U. S. 799. The defendants in *Grant* v. *United States*, 268 Fed. 443 (C. C. A. 6), certiorari denied, 256 U. S. 700; *Corbett* v. *United States*, 89 F. 2d 124 (C. C. A. 8); and *Richardson* v. *United States*, 150 F. 2d 58 (C. C. A. 6), gave directions which naturally lead to the use of the mails. And, the defendants in *Smith* v. *United States*, 61 F. 2d 681 (C. C. A. 5), certiorari denied, 288 U. S. 608, and *Clarke* v. *United States*, 132 F. 2d 538 (C. C. A. 9), certiorari denied, 318 U. S. 789, actually knew of, and probably acquiesced in, the use of the mails.

[11] Thus, *Spear* v. *United States*, 246 Fed. 250 (C. C. A. 8), certiorari denied, 246 U. S. 667; *Savage* v. *United States*, 270 Fed. 14 (C. C. A. 8), certiorari denied, 257 U. S. 642; *Tincher* v. *United States*, 11 F. 2d 18 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Goodman* v. *United States*, 97 F. 2d 197 (C. C. A. 3), certiorari dismissed, 305 U. S. 578; *Hart* v. *United States*, 112 F. 2d 128 (C. C. A. 5), certiorari denied, 311 U. S. 684;

previously stated, that is not the situation here, and accordingly it should not be said that respondent "caused" the interstate transportation of the checks, which was an incidental result and not an integral part of his alleged activities. See opinion below (R. 21-25); *United States* v. *Wood*, 58 F. Supp. 451 (N. D. W. Va.); *United States* v. *Hopper*, 63 F. Supp. 612 (D. Ore.); *United States* v. *Flores*, 66 F. Supp. 880 (Dist. Ct. Virgin Islands, Div. St. Thomas and St. John); *Spillers* v. *United States*, 47 F. 2d 893 (C. C. A. 5); *Stapp* v. *United States*, 120 F. 2d 898, 899 (C. C. A. 5).

The broad construction of "cause" which the Government is forced by the instant circumstances to urge not only finds little actual support in judicial precedent, but in addition would extend the statute beyond its purpose and would produce absurd and unjust results. For those reasons it should not be adopted. The axiom that criminal statutes should be narrowly or strictly construed, of course, does not mean that the words employed are to be given their narrowest possible meaning or that the evident meaning and purpose of legislation is to be distorted or nullified.

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and *Harris* v. *United States*, 140 F. 2d 567 (C. C. A. 4), all involved checks deposited or presented by defendants for collection, and the use of some means of transmission was obviously essential to the consummation of the plans of the defendants. *United States* v. *Lowe*, 115 F. 2d 596 (C. C. A. 7), certiorari denied, 311 U. S. 717; *Guardalibini* v. *United States*, 128 F. 2d 984 (C. C. A. 5); *United States* v. *Feldman*, 136 F. 2d 394 (C. C. A. 2), affirmed on a different point, 323 U. S. 487, rehearing denied, 323 U. S. 811; and *United States* v. *Citrin*, 58 F. Supp. 766 (S. D. N. Y.), all involved check kiting schemes which are entirely dependent upon the blank clearance system and its attendant delays for success. In *Shea* v. *United States*, 251 Fed. 440 (C. C. A. 6), certiorari denied, 248 U. S. 581, one of the defendants suggested that the dupe "send" a check so that the illicit gain could be secured.

Decker v. *United States*, 140 F. 2d 378 (C. C. A. 4), certiorari denied, 321 U. S. 792, involved a continuing scheme to defraud.

Clarke v. *Sanford*, 156 F. 2d 115 (C. C. A. 5), pending on a petition for a writ of certiorari, No. 397 at the present Term, and *Tolle* v. *Sanford*, 58 F. Supp. 695 (N. D. Ga.), both of which involve the application of the instant statute to circumstances substantially similar to those involved in this case, are to the contrary.

See *United States* v. *Gaskin*, 320 U. S. 527, 529-530; *Singer* v. *United States*, 323 U. S. 338, 341-342. It does mean, however, that the language used must be taken in a reasonable sense which does not work manifest injustice (*Baender* v. *Barnett*, 255 U. S. 224), and that the offense must be stated with appropriate definiteness which should not be judicially enlarged, *Pierce* v. *United States*, 314 U. S. 306. The latter is particularly true with respect to federal criminal statutes, such as the instant one, which supplement state law, because the administration of criminal justice rests primarily with the states and because a prosecution for violation of the law of a state does not bar on the ground of double jeopardy a prosecution for violation of a federal statute arising out of the same circumstances. See *Jerome* v. *United States*, 318 U. S. 101, 104-105. And, this Court has emphasized that broad statutory language must be construed consonantly with, rather than independently of, the legislative purpose, especially when absurd or unjust results would otherwise occur. See *Chatwin* v. *United States*, 326 U. S. 455, 464-465; *United States* v. *Carbone*, 66 S. Ct. 734, 736, 738 (No. 474, O. T. 1945); *Sorrells* v. *United States*, 287 U. S. 435.

Since the statutory language here involved should "be read and applied in light of the evils which gave rise to the statute and the aims which the proponents sought to achieve" (*United States* v. *Carbone*, *supra*, at p. 736), it is necessary to consider those evils and aims as revealed by the background and legislative history of the National Stolen Property Act. As the title of the Act indicates (48 Stat. 794), it was adopted to extend generally the provisions of the National Motor Vehicle Theft Act to other stolen property, and the evils which prompted its enactment were the same as those which led to its predecessor,[12] namely,

[12] See *Brooks* v. *United States*, 267 U. S. 432, 438-439.

the alarming and widespread use which criminals were making of the modern facilities of interstate and foreign commerce to carry out their illegal activities and to circumvent effective prosecution by state authorities.[13] There is nothing in the legislative history of the 1939 amendment, which *inter alia* brought spurious securities and counterfeiting tools within section 3 of the Act (see pp. 3-4, *ante*), to indicate that Congress had any different evil in mind.[14] In the light of that background and that history it is believed that the purpose of Congress in enacting the Act and the amendment of 1939 was to punish those who used or brought about the use of interstate transportation as an integral part of carrying out their illegal activities, and, conversely, that Congress did not intend to reach illegal activities, such as those in which respondent is claimed to have engaged, which are essentially local in character and incidentally result in interstate transportation which is neither essential nor substantially related to the carrying out of those activities. There is nothing in the legislative history of the statute indicating that state authorities were unable to deal effectively with persons who uttered forged checks within

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[13] That was stated by Senator Ashurst, the sponsor of the Act in the Senate, as follows (78 Cong. Rec. 6981):

> "Gangsters who now convey stolen property, except vehicles, across the State line, with that immemorial gesture of derision, thumb their nose at the officers. This bill extends the provisions of the National Motor Vehicle Theft Act to other stolen property described in the bill."

See also H. Rep. 1462 and S. Rep. 538, 73d Cong., 2d sess. Those reports sketch the history of previous legislative attempts to deal with the problem. Hearings which were held on one of those attempts (H. R. 10287, 70th Cong., 1st sess.) stressed the difficulties confronting state officials in effectively prosecuting criminals operating across state lines, and particularly the difficulty of securing witnesses (see Hearings on H. R. 10287, vol. 491 H. Comm. Hearings). That particular difficulty is not present in this case.

See also *Husten* v. *United States*, 95 F. 2d 168 (C. C. A. 8).

[14] See H. Rep. 422 and S. Rep. 674, 76th Cong., 1st sess.

their jurisdiction even though such checks were drawn on out-of-state banks, and, likewise, there is no indication that Congress intended to assist the states in dealing with such persons. Indeed, the undesirability of covering essentially local offenses was pointed out when the 1939 amendment was discussed in the Senate.[15] There would thus appear to be no more warrant for comprehending the alleged activities of respondent within the statute because of the incidental interstate transportation of the checks than there was for holding that the broad sweep of the language of the Federal Kidnapping Act (18 U. S. C. 408a), which like the National Stolen Property Act was part of the Congressional program to assist the states in dealing with the interstate ramifications of crime, applied to "general transgressions of morality involving the crossing of state lines". See *Chatwin* v. *United States*, 326 U. S. 455, 464-465. Moreover, to do that would have the absurd result of putting the federal courts in the police court business when there is no indica-

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[15] The following significant colloquy occurred between Senator O'Mahoney, the sponsor of the bill in the Senate, and Senator King, when the latter requested an explanation of the bill (84 Cong. Rec. 9411-9412):

Mr. O'Mahoney: Mr. President, this bill came from the Judiciary Committee with a unanimous report. The National Stolen Property Act is sought to be amended by this measure, which originated in the House and has the support of the Department of Justice, so as to extend its provisions to embezzled property as well as to counterfeit securities. The Senate committee amended the bill to include the materials with which counterfeiting is carried on. I am sure the bill is thoroughly meritorious, and should be passed.

Mr. King: Mr. President, will the Senator yield?

Mr. O'Mahoney: Certainly.

Mr. King: The Senator will recall that a short time ago we passed an act under the terms of which larceny, when the transportation was from one jurisdiction to another, was made a Federal offense. I was opposed to the bill, and am glad to know that the President vetoed it. This bill does not go so far as to make larceny, or other offenses which are purely intrastate, interstate in character, subjecting the offenders to Federal jurisdiction.

Mr. O'Mahoney: The pending bill is not of the character of the measure to which the Senator is referring. The bill deals with the transportation

tion that the states are unable to deal effectively with such activities, and would have the unjust result of subjecting offenders to heavy double punishment for what is in essence a single, local offense. See *United States* v. *Wood*, 58 F. Supp. 451 (N. D. W. Va.); *United States* v. *Hopper*, 63 F. Supp. 612 (D. Ore.); *United States* v. *Flores*, 66 F. Supp. 880 (Dist. Ct. Virgin Islands, Div. St. Thomas and St. John).[16] That should not be done without a clear Congressional mandate. See *Chatwin* v. *United States, supra; Jerome* v. *United States*, 318 U. S. 101, 104-105. Since such a mandate is lacking here, it should not be said that respondent "caused", within the meaning of the statute, the interstate transportation which it is assumed occurred when the banks in Jackson forwarded the checks to the out-of-state banks on which they were drawn.

B. *Respondent did not "with fraudulent intent" "cause" the interstate transportation of the checks*

If, despite the foregoing, this Court believes that respondent "caused" the interstate transportation of the checks, we submit that he did not "cause" that transportation with "fraudulent intent" as required by the statute. The basis

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of such property in interstate commerce, a character of offense which cannot be handled except in this manner.

Mr. King: With that understanding, I shall not object. However, I look with much apprehension upon the constant encroachment by the Federal Government and its assertion of jurisdiction over matters which, under our form of government, belong especially, peculiarly, and solely to the States.

Mr. O'Mahoney: Let me give the Senator an instance of what is needed under the present situation. The stock certificates of the New York Central Railroad were counterfeited in the City of Chicago, and were sold throughout the West, indeed, as a matter of fact, throughout the country. This bill would make the transportation of counterfeit securities of an interstate corporation a Federal offense. It is a wholly harmonious provision.

[16] That is the situation here. Respondent is now serving in a Michigan prison a state conviction which was based on the transactions involved in this case.

for our contention is that the provisions of the 1939 amendment to the statute which cover spurious securities are *pari materia* with the mail fraud statute (Criminal Code § 215, 18 U. S. C. 338) and that on the basis of the construction of the mail fraud statute in *Kann* v. *United States*, 323 U. S. 88, and *Dyhre* v. *Hudspeth*, 106 F. 2d 286 (C. C. A. 10), the asserted activities of respondent do not contravene the instant statute. This contention is supported by the opinion below (R. 21-25) and by *United States* v. *Wood*, 58 F. Supp. 451 (N. D. W. Va.); *United States* v. *Hopper*, 63 F. Supp. 612 (D. Ore.); and *United States* v. *Flores*, 66 F. Supp. 880 (Dist. Ct. Virgin Islands, Div. St. Thomas and St. John). To the contrary are *Clarke* v. *Sanford*, 156 F. 2d 115 (C. C. A. 5), pending on petition for a writ of certiorari, No. 397 at the present Term, and *Tolle* v. *Sanford*, 58 F. Supp. 695 (N. D. Ga.).

It is true that the pertinent language of the two statutes differs,[17] but the difference seems immaterial, as the court below said (R. 25), when the similarity of plan and purpose of the statutes is considered. They appear to be the only offenses against the postal service and against foreign and interstate commerce which are contained in Chapters 8 and 9 of Title 18 of the United States Code which depend upon the element of fraud for their operation. There is no persuasive or logical reason for supposing that Congress meant

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[17] The pertinent language of the mail fraud statute is:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter * * * in any post office * * *."

The pertinent language of the National Stolen Property Act (see pp. 2-4, *ante*) is:

"* * * whoever with * * * fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited * * *."

to be more solicitous in protecting the channels of interstate transportation against becoming avenues of fraud than it has been of the mails.

The gist of the offense under the mail fraud statute is the use or the causing of the use of the mails for the purpose of executing a fraudulent scheme. Similarly, the gist of the offense under the spurious securities provisions of the 1939 amendment of the instant statute is not, contrary to the argument of the Government and the holdings in *Clarke* v. *Sanford* and *Tolle* v. *Sanford, supra,* the interstate transportation or causing of the interstate transportation of known spurious securities; there must be in addition a fraudulent intent. The only sound construction of that requirement is that it means that the interstate transportation must be for the purpose of executing a fraudulent scheme, which is the requirement of the mail fraud statute with respect to using the mails. That is so because the effect of any other construction is to read the requirement of fraudulent intent out of the statute.

It is true that spurious securities are not legitimate articles of commerce, and Congress might have excluded them from the channels of interstate commerce because of their spurious character by forbidding the transportation of them with knowledge of their character, as Congress has done with respect to articles which are deemed injurious to the public health,[18] or the public morals,[19] or which are otherwise tainted with an aura of illegality.[20] The fact that Congress

[18] E.g., the Pure Food and Drug Act of June 30, 1906, c. 3915, 34 Stat. 768. See *Hipolite Egg Co.* v. *United States,* 220 U. S. 45.

[19] E.g., the Act of March 2, 1895, c. 191, 28 Stat. 963, for the suppression of the lottery traffic—see *Champion* v. *Ames,* 188 U. S. 321—, and the White Slave Traffic Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 397-404)—see *Hoke* v. *United States,* 227 U. S. 308.

[20] E.g., the National Motor Vehicle Theft Act (18 U. S. C. 408), see *Brooks* v. *United States,* 267 U. S. 432; and, the stolen property provisions of section 3 of the National Stolen Property Act.

did not do that in the instant statutory provisions sufficiently indicates that Congress was not concerned with preventing the interstate transportation of spurious securities with knowledge of their character. Congress was concerned rather with preventing the effectuation of fraud through the interstate transportation of spurious securities; otherwise the requirement of fraudulent intent is superfluous and meaningless. In other words, the instant statutory provisions do not purport to reach spurious securities, the interstate transportation of them, or fraud in connection with them generally; consistently with the legislative purpose (see *ante*, pp. 18-21), those provisions cover the interstate transportation of spurious securities as an integral part of executing a fraudulent scheme, leaving other situations to be dealt with by appropriate state law. Cf. *Kann* v. *United States*, 323 U. S. 88, 95. Like the mail fraud statute, the instant provisions of the 1939 amendment are aimed not at the things employed (mailable matter in the one case and spurious securities in the other) or the transmission of them (through the mails, and by interstate transportation) but at the transmission of them in the promotion of fraud.

Construing the statute as becoming operative only when interstate transportation of spurious securities is in furtherance of a fraudulent scheme does not unduly restrict the statute [21] but instead makes it consonant with the legislative purpose, which, as previously discussed (*ante*, pp. 18-21) was to punish interstate transportation which was an inte-

[21] As so construed, the statute reaches the illustration posed by the Government (Brief, pp. 31-32) to support its argument to the contrary. B, in that example, may be said, consistently with the interpretation of cause for which we contend (*ante*, pp. 13-21), to have "caused" the interstate transportation of the spurious security, and since he intended to utter it, the interstate transportation was for the purpose of executing a scheme to defraud. Hence he is guilty of a violation of the statute. A, who knowingly makes that violation possible, is at the least an aider and abetter and hence liable as a principal under section 332 of the Criminal Code (18 U. S. C. 550).

gral part of criminal activity, in this instance, fraud. And, it would eliminate the absurd and unjust results which are pointed out at pp. 20-21, *ante*, of providing federal punishment for essentially local offenses with which the states are competent to deal.

The alleged activities of respondent would not support a conviction under the mail fraud statute, if the means employed by the Jackson banks to forward the checks had been the mails. *Kann* v. *United States*, 323 U. S. 88; *Dyhre* v. *Hudspeth*, 106 F. 2d 286 (C. C. A. 10). Since, for the reasons stated, the instant statutory provisions are *pari materia* with the mail fraud statute, it follows that respondent has not violated them. See opinion below (R. 21-25); *United States* v. *Wood*, 58 F. Supp. 451 (N. D. W. Va.); *United States* v. *Hopper*, 63 F. Supp. 612 (D. Ore.); *United States* v. *Flores*, 66 F. Supp. 880 (Dist. Ct. Virgin Islands, Div. St. Thomas and St. John). Here, as in the *Kann* and *Dyhre* cases, the asserted fraudulent scheme was complete when respondent cashed the checks and received the money which was his objective; the persons who cashed the checks became holders in due course and the owners of them;[22] and the subsequent interstate transportation of the checks by them or by takers from them was not in furtherance of the asserted fraudulent scheme. The invalidity of the checks is immaterial. *Dyhre* v. *Hudspeth*, *United States* v. *Wood*, *United States* v. *Hopper*, *United States* v. *Flores*, *supra*; opinion below (R. 21-25). Accordingly, respondent did not "with fraudulent intent" "cause" the interstate transportation of the checks within the meaning of the statute.

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[22] See Michigan Compiled Laws of 1929, § 9301; *American Surety Co.* v. *Savings Bank*, 242 Mich. 581.

Part II

Respondent Is In Any Event Entitled to A New Trial

Introduction

The preceding part of this argument has been concerned with the question decided below and raised by the petition for a writ of certiorari. If that question is resolved by this Court favorably to respondent, the matter is, of course, at an end. If that question is not so resolved, then other questions, relating chiefly to the admission of certain testimony and to the sufficiency of the Government's evidence, must be decided before respondent's conviction can be finally upheld. The purpose of this Part II is to urge this Court, if it should resolve that question adversely to respondent, to consider those other questions and on the basis thereof grant a new trial to respondent, instead of remanding the cause to the Circuit Court of Appeals for further proceedings.

The grounds justifying a new trial, either of which is sufficient, are that reversible error was committed by the admission of certain hearsay testimony and that the evidence of the Government is insufficient to sustain the conviction. Those grounds were raised in the court below (R. 14) but were not passed on there because that was unnecessary (R. 23). Obviously, they are not presented by the Government's petition for a writ of certiorari. We realize that this Court does not consider matters, such as these grounds, which are not passed on below or presented by the petition for a writ of certiorari, except in exceptional cases where the ends of justice are served by so doing, and then only in cases coming from the federal courts. See generally Robertson and Kirkham, "Jurisdiction of the Supreme Court of the United States," § 389. We, therefore, make our request that this Court grant a new trial if the

judgment below is reversed, because we believe that this case is an exceptional case of that nature which fulfills those requirements. Respondent is now confined in a Michigan state prison, is without funds and is unable to employ counsel of his own choice. The entire case is here and this Court has full power to decide all questions involved in it. The validity of the grounds which we assert are easily demontrable and clearly warrant a new trial. Accordingly, we turn to a consideration of those grounds.

A. *The Admission of Hearsay Testimony Constituted Reversible Error*

The testimony of an agent of the Federal Bureau of Investigation to the effect that the United States Department of Commerce had no agency "U. S. E. F. C. 14A" or one "A. J. Davis, Commissioner," which was taken over respondent's objection, was based on reports prepared by his department of an investigation which he did not personally conduct (R. 19-20). That testimony was clearly hearsay, and its admission constituted reversible error. See *United States* v. *Campanaro*, 63 F. Supp. 811 (E. D. Pa.), in which it was held that a new trial was necessary because of the admission of hearsay testimony of a Secret Service agent as to what "our records show." See also *Hopt* v. *Utah*, 110 U. S. 574; *Cook* v. *United States*, 138 U. S. 157; *Donnelly* v. *United States*, 228 U. S. 243, rehearing denied, 228 U. S. 708.

Likewise the testimony of a Jackson police officer that he had learned through police channels of the arrest of respondent, which was also taken over respondent's objection (R. 19), was inadmissible hearsay. In addition it was improper because it impugned respondent's character although respondent did not put his character in issue. See Wigmore on Evidence, 3d Ed., vol. 1, § 57.

The admission of the hearsay testimony of those two officers cannot be characterized as "mere harmless error," not warranting a new trial, within the meaning of Section 269 of the Judicial Code (28 U. S. C. 391). At best the Government's case was not a strong one—indeed it is earnestly believed it is not sufficient to sustain the conviction—and it cannot be said that the admission of that testimony was not prejudicial. See *Kotteakos* v. *United States*, 66 Sup. Ct. 1239 (Nos. 457, 458, O. T. 1945); *Bihn* v. *United States*, 66 Sup. Ct. 1172 (No. 675, O. T. 1945); *Bollenbach* v. *United States*, 326 U. S. 607; *United States* v. *Campanaro*, *supra*.

B. *The Evidence Presented by the Government Is Insufficient to Sustain the Conviction*

A new trial is also warranted because of the insufficiency of the Government's evidence. The Government (Brief, p. 18) does not seek to sustain the conviction on Count Three of the indictment, which covered the check apparently signed by respondent in his own name as maker, and correctly so since such a check is not a "falsely made" or "forged" document within the general law, even though it may be an invalid one.[23] Accordingly, this discussion of

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[23] See annotation, 41 A. L. R. 229, where many of the relevant cases are discussed. See also *United States* v. *Wentworth*, 11 Fed. 52 (D. N. H.); *In re Tully*, 20 Fed. 812, 815 (S. D. N. Y.); *United States* v. *Moore*, 60 Fed. 738 (N. D. N. Y.); *De Rose* v. *People*, 64 Colo. 332 (1918); *Goucher* v. *State*, 113 Nebr. 352, 354-355 (1925); *State* v. *Lamb*, 198 N. C. 423 (1930). Congress has apparently realized the legal distinction between a "false" and a "falsely made" document in previous legislation. See *United States* v. *Staats*, 8 How. 41.

There are cases to the contrary—for example *United States* v. *Tommasello*, 64 F. Supp. 467 (E. D. N. Y.)—but they represent the minority view.

This question does not appear to have been decided under the instant statute. The checks involved in *United States* v. *Wood*, 58 F. Supp. 451 (N. D. W. Va.), *United States* v. *Hopper*, 63 F. Supp. 612 (D. Ore.), and *United States* v. *Flores*, 66 F. Supp. 880 (Dist. Ct. Virgin Islands,

the sufficiency of the evidence is addressed only to the offenses charged in Counts One and Two of the indictment which relate to the checks signed as maker by "U. S. E. F. C. 14A, A. J. Davis, Commissioner."

As previously stated (*ante*, pp. 11-12), two essential elements of the offense defined by the spurious securities provisions of section 3 of the National Stolen Property Act are (1) fraudulent intent and (2) knowledge of the spurious character of the securities. The Government presented no direct evidence of the existence of either of those elements. None was necessary, since intent and knowledge, on which direct evidence is seldom available, may be proved by circumstantial evidence. See *Gates* v. *United States*, 122 F. 2d 571, 575 (C. C. A. 10), certiorari denied, 314 U. S. 698; *Marshall* v. *United States*, 146 F. 2d 618, 620 (C. C. A. 9); *Rice* v. *United States*, 149 F. 2d 601, 603 (C. C. A. 10). However, a criminal conviction cannot stand on the basis of circumstantial evidence unless that evidence is not only consistent with guilt but also inconsistent with every reasonable hypothesis of innocence. See *Thompson* v. *United States*, 145 F. 2d 826 (C. C. A. 5), certiorari denied, 324 U. S. 861; *Crain* v. *United States*, 148 2d 615, 617 (C. C. A. 5); *United States* v. *Laffman*, 152 F. (2d) 393 (C. C. A. 3). The circumstantial evidence presented by the Government on the issues of fraudulent intent and knowledge of the spurious nature of the two checks does not meet that standard.

Taking the Government's evidence with respect to those issues most favorably to the Government, as must be done

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Div. St. Thomas and St. John), were drawn in the name of the defendants, but the question of whether they were "falsely made" was not discussed, the statute being held inapplicable on other grounds (see *ante*, pp. 17 and 22. It is not stated in *Clarke* v. *Sanford*, 156 F. 2d 115 (C. C. A. 5), pending on petition for a writ of certiorari, No. 397 at the present Term, and *Tolle* v. *Sanford*, 58 F. Supp. 695 (N. D. Ga.), whether the checks involved were made in the name of the defendants or in the name of another.

when its sufficiency is challenged (see *Glasser* v. *United States*, 315 U. S. 60, 80), it discloses only that (1) respondent negotiated two identically drawn checks, made in the name of another, one of which was represented to have been received in the course of his business, and both of which were dishonored by the drawee bank because the purported maker had no account, and (2) an investigation disclosed that the United States Department of Commerce had no agency or agent bearing the name of the purported maker—(the testimony based on that investigation was inadmissible hearsay as previously shown, *ante*, pp. 27-28). That is not enough to support an inference that respondent passed those two checks with knowledge that they were spurious and with fraudulent intent. The fact that a person passed a forged check or counterfeit money does not prove or justify an inference that he knew its spurious character or that he intended to defraud; something more than the naked act of passing must be shown. See *United States* v. *Ruffino*, 67 F. 2d 440 (C. C. A. 2); *Price* v. *United States*, 70 F. 2d 467 (C. C. A. 4); *People* v. *Cohen*, 343 Ill. 437 (1931); *People* v. *Chronister*, 379 Ill. 617 (1942); *Cook* v. *State*, 126 Tex. Cr. 454 (1934); *State* v. *Kozukonis*, 46 A. 2d 865, 869 (R. I., 1946). That something more is lacking here. Thus, there was no attempt to identify respondent's handwriting with that of the checks in question, or to show that respondent had engaged in any similar activities, or to prove the numerous aliases set forth in the indictment (R. 2-4). This deficiency in the Government's proof cannot be remedied by drawing an inference of guilty knowledge or intent from respondent's failure to take the stand and explain how he acquired the two checks. The Act of March 16, 1878, c. 37, 20 Stat. 30 (28 U. S. C. 632) forbids that. See *Bruno* v. *United States*, 308 U. S. 287; *Bradford* v. *United States*, 129 F. 2d 274, 278, 130 F. 2d 630 (C. C. A. 5), certiorari denied, 317 U. S. 683.

Respondent is therefore entitled to a new trial because the evidence of the Government is not sufficient to prove that he had the requisite knowledge and fraudulent intent.

Conclusion

For the reasons stated in Part I of the argument, the judgment below should be affirmed. In the event, however, that this Court should decide to reverse the judgment below, this Court should at the same time grant a new trial, without remanding the cause to the Circuit Court of Appeals for further proceedings, for the reasons stated in Part II of the argument.

Respectfully submitted,

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